

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 26, 2008 Session

**STATE OF TENNESSEE v. JOHN C. CLINE**

**Direct Appeal from the Criminal Court for Sullivan County**  
**No. S52058                      Robert H. Montgomery, Jr., Judge**

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**No. E2007-01995-CCA-R3-CD - Filed November 17, 2008**

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A jury convicted the Defendant, John C. Cline, of passing a worthless check, a Class E felony, and theft over \$500, a Class E felony. The trial court sentenced the Defendant to two concurrent eighteen-month periods of probation. The Defendant appeals, contending that the evidence was insufficient to support the jury's findings; that the trial court erred in admitting evidence of prior bad acts; and that the trial court erred in admitting evidence of a prior conviction. After thoroughly reviewing the record and the relevant authorities, we conclude that there is no error and affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. McLIN, JJ., joined.

William A. Kennedy, Blountville, Tennessee, for the Appellant, John Chadwick Cline.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, District Attorney General; and J. Lewis Combs, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**I. Facts**

At trial, the following evidence was presented: Steven Roark testified that he had known the Defendant as a friend of his son, Phillip Roark, for a few years before the conduct at issue on February 3, 2005. He recounted that in 2004 he "bought some guitars from [the Defendant] as a favor to him." Specifically, Roark said that he gave the Defendant \$2,000 in exchange for a Gibson guitar, a Schecter guitar, and a third guitar of a brand Roark could not recall. Roark explained that his primary purpose in buying the guitars was to help the Defendant; Roark neither played nor collected guitars: "I bought some guitars from [the Defendant] as a favor to him. He just needed to

sell them and I needed to help him and I bought the guitars.” Roark said the Defendant mentioned he might return in six to eight months to re-purchase the guitars.

In January 2005 Roark gave two of the guitars to his son, because the Defendant had not returned to re-purchase them. Soon thereafter the Defendant returned and requested to re-purchase the guitars. Roark accordingly retrieved the guitars from his son. The Defendant returned on February 3, 2005, and gave Roark a Glock 40 caliber gun along with a \$900 check in exchange for the guitars. Roark testified that the gun was worth \$250. Roark testified that the Defendant said nothing about when Roark should cash the check.

Roark testified that when he attempted to cash the check within two or three days, the bank told him there were insufficient funds to cash the check. Roark contacted the Defendant, and the Defendant assured Roark that the bank must have made a mistake and instructed him to try to cash the check again. When Roark returned to the bank, the bank cashed the check. However, the bank soon notified Roark that the Defendant had closed the account and that the bank would soon deduct \$906 (the amount of the check plus a service fee) from Roark’s account.

After the bank twice refused to honor the check, Roark confronted the Defendant. However, Roark said the Defendant again told him the bank was mistaken and the account contained funds. Roark suggested the Defendant simply return the guitars in exchange for the gun, but the Defendant claimed someone had stolen the guitars. Roark explained that he would not have transferred the guitars to the Defendant if he had known that the Defendant had closed the account upon which the check was drawn.

On cross-examination Roark clarified that he gave the Defendant one \$1200 check for the Schector guitar, which the Defendant said was worth \$1700; and one \$800 check for both the Gibson and the third guitar, which the Defendant said together were worth “\$3700 or something.” He explained that the Defendant exchanged a \$900 check and a Glock 40 caliber gun for the Gibson guitar and the unidentified guitar, for which Roark had originally paid the Defendant \$800. Roark said that the Defendant insisted on giving him a \$900 check:

He said it was because I had to go through the trouble to get them back and that he appreciated me giving them back because his dad had given him the one and he was going to write the check for \$900.00 and I told him that wasn’t necessary, that he could just give me the gun and \$800.00 and he said no, he wanted me to have the \$900.00 and I said, well, okay.

Roark reiterated that the Defendant never instructed him to hold the check for a week and a half before cashing it.

Pete Lauzon, the manager of the AmSouth bank in Bristol, Tennessee, at the time of the conduct at issue, testified that the Defendant overdrew on his account with the bank at least four times between December 19, 2002, and February 19, 2003. This left the Defendant with a negative balance of \$74.99 on February 19, 2003. Lauzon testified that on February 22, 2003, the bank notified the Defendant that it would close his account within twenty days if he did not resolve the

\$74.99 deficiency. After the Defendant failed to deposit funds, the bank closed his account on March 14, 2003.

Lauzon explained that on February 7, 2005, Roark presented for payment a check drawn from the Defendant's account and dated February 3, 2005. Roark said that although the bank initially honored the check, it subsequently deducted the amount of the check from Roark's account because it discovered the Defendant's account was closed. On cross-examination, Lauzon clarified that although the bank's notice of its intent to close the account was not returned as "undeliverable," he did not know whether the Defendant actually received notice.

The Defendant testified that that he bought the Gibson guitar for \$1500 in the late 1990s; the Schector guitar for \$450 in 2002; and the Takamine for \$130 in 2002. The Defendant said that in the spring of 2004 he exchanged the Gibson guitar for a \$1200 check from Roark and the Schector and Takamine guitars for a \$800 check from Roark. He confirmed that he told Roark that he might want to re-purchase the guitars in the future.

The Defendant recounted that he eventually returned to re-purchase the guitars but that Roark would only sell him the Schector and Takamine. He continued:

So we worked out a payment that I would give him the \$800.00 back, the original price for the other two that I'd purchased—or he had purchased off of me. And I told him that since he had helped me out the year before that, that I would give him \$100.00, you know, just to try to help him out.

The Defendant accordingly executed a \$900 check to Roark. He testified that although he did not post-date the check, he instructed Roark to hold the check a few weeks in order for the Defendant to deposit an anticipated tax refund check.

After describing the re-purchase, the Defendant denied any knowledge that his bank account was closed: "at that time I didn't know that my account was in the wrong." He explained that he directly paid each of the four parties to whom he had written worthless checks. He denied receiving any correspondence from the bank notifying him of his account's pending closure. The Defendant explained that he simply "didn't pay that much attention to that account." The Defendant reiterated that although he knew the account did not contain enough money to cover the check he gave to Roark, he "asked [Roark] to hold the check until [he had] put the money from [his] tax refund in there and [Roark] said that was fine."

The Defendant recalled what happened when the bank refused to cash the check: So I told [Roark], you know, obviously the money wasn't in there yet and why did he try to. And he said he had misunderstood me but it was okay, that he would just hold the check till I'd come—till I—actually I told him I would bring him the money for the check instead of depositing it in the bank at that time, after the first time that he tried to deposit it.

The Defendant claimed that Roark rejected this offer and suggested that the Defendant instead "just trade him out even for the handgun for the two guitars and he would, you know, do away with the

check.” The Defendant stated that he bought the gun for about \$600 in 1999, and that he agreed to the latter exchange because it left him “coming out maybe \$150.00 to the good, there, you know, doing it that way.”

After giving Roark the gun, the Defendant said that he asked Roark to destroy the check. According to the Defendant, Roark said that he would do so. The Defendant said that Roark returned within the next week, after having tried to cash the check again, and wavered between wanting to exchange the gun for the \$900 originally owed and wanting to exchange the gun for the Schector and Takamine guitars. He said that Roark finally decided “he’d just rather have the money.” The Defendant told Roark that he would give Roark the money when Roark brought him the original \$900 check and either the Gibson guitar or the gun. However, the Defendant said that Roark never returned. The Defendant confirmed that he did not intend to gain possession of the guitars without giving value for them.

On cross-examination, the Defendant insisted that he never read a notice from AmSouth that his account would be closed and suggested that his former wife might have opened the notice without informing him of it. He stated that he received no statement from AmSouth after January 2005. The Defendant conceded that Roark had only a limited knowledge of guitars and conceded that, in the state attorney’s words, Roark was “giving [the Defendant] money for those guitars when he really didn’t need the guitars, so he was doing that . . . as a favor to [the Defendant].” He explained he expected to receive only an \$800 tax refund, but his wife at the time expected a \$3200 earned income credit, which they planned to share.

The Defendant explained he ordinarily used a bank account with First Bank and Trust, and he only used the AmSouth account to pay “one certain bill.” He said he believed the AmSouth account contained “maybe 7 or \$8.00 in it just to keep it open at that point” and that the bank never notified him the account had a negative balance and would soon be closed. However, the Defendant also testified he was “pretty sure that [he] did go back down there and talk to [the bank manager]” about the last three overdrafts that ultimately caused the account to be closed. The Defendant said he did not remember why he believed the account had a positive balance and confirmed he had neither withdrawn from nor deposited into the account since 2003. He explained he wrote the \$900 check from the AmSouth account because he and his wife had already closed the First Bank and Trust account. For impeachment purposes, the State was allowed to cross-examine the Defendant about the conduct underlying the Defendant’s expunged theft conviction of August 14, 2004. After hearing the above testimony and reviewing the documents introduced during Lauzon’s testimony, the jury returned a verdict finding the Defendant guilty of both passing a worthless check and theft of property valued at over \$500. It is from these judgments that the Defendant now appeals.

## **II. Analysis**

### **A. Admission of the Expunged Theft Conviction in Order to Impeach**

The Defendant contends the trial court erred in admitting evidence of a prior, expunged theft conviction to impeach the Defendant’s testimony. The State answers that the Defendant waived

review of this issue by failing to raise it in his motion for a new trial and that the admission of the guilty plea was not plain error. We agree with the State.

An issue presented for review shall not consist of error predicated upon admission of evidence in a jury trial unless the appellant raises the evidentiary error in his motion for a new trial. Tenn. R. App. P. 3(e). However, where reversal of error that has affected substantial rights of an accused is necessary in order to do substantial justice, a reviewing court may base a finding of error on an admission of evidence regardless of whether the appellant waived review of the error. Tenn. R. Crim. P. 52(b). Such an error is known as “plain error.” Tenn. R. Crim. P. 52(b).

Whether an issue rises to the level of plain error is a decision that lies within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. *See* Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994). In *Adkisson*, this Court stated that the following factors should be considered by an appellate court when determining whether an error constitutes “plain error”: (a) the record must clearly establish what occurred at the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is “necessary to do substantial justice.” *Adkisson*, 899 S.W.2d at 641-42 (citations omitted). Our Supreme Court characterized the *Adkisson* test as a “clear and meaningful standard” and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

The Defendant has failed to carry his burden of showing plain error, because the trial court breached no clear and unequivocal rule of law in allowing the State to question the Defendant about his expunged conviction. The Defendant contends that the trial court erred in allowing the State to cross-examine the Defendant about an expunged theft conviction to which the Defendant originally pled guilty. Rule 608(b) of the Tennessee Rules of Evidence governs the admissibility of prior expunged convictions to impeach a witness’s testimony. *State v. Shawn McCobb*, No. W2006-01517-CCA-R3-CD, 2007 WL 2822921, at \*8 (Tenn. Crim. App., at Jackson, Sept. 26, 2007) (“The State concedes, and we agree, that Rule 609 of the Tennessee Rules of Evidence does not apply when a defendant-witness is impeached with a criminal prosecution that resulted in judicial diversion.”), *no Tenn. R. App. P. 11 application filed*; *State v. Jesse Rose Tolbert*, No. E1999-02326-CCA-R3-CD, 2000 WL 1172344, at \*4 (Tenn. Crim. App., at Knoxville, Aug. 18, 2000) (concluding that “when a defendant is granted judicial diversion there is no conviction within the meaning of Rule 609” and that Rule 608 governs the issue) (citing *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999); *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995)), *no Tenn. R. App. P. 11 application filed*.

Although under Rule 608(b) the State may not introduce extrinsic evidence of an expunged conviction, the State may cross-examine a witness about his conviction in order to impeach the witness’s credibility as long as certain conditions are met. The text of Rule 608(b) lays out these conditions:

**(b) Specific Instances of Conduct.** Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

Tenn. R. Evid. 608(b). Therefore, Rule 608(b) requires two conditions to be satisfied in order for the State to question a Defendant about a prior bad act: (1) the State must give the accused reasonable written notice of its intent to impeach with the bad act; and (2) the trial court must hold a hearing before the accused's testimony to determine that the proposed impeachment's unfair

prejudicial effect does not outweigh its probative value on credibility.

The Tennessee Supreme Court announced a balancing test trial courts should apply to determine whether to admit prior convictions for impeachment purposes under Rule 609. *State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003). The test facilitates a trial court's balancing of the conviction's probative value and prejudicial effect. Courts should consider: "(1) the impeaching conviction's relevance as to credibility; and (2) the impeaching conviction's similarity to the charged offense." *Id.* (citing *State v. Mixon*, 983 S.W.2d 661, 675 (Tenn. 1999)). Careful consideration of the similarity of the offenses prevents juries from using the prior conviction as propensity evidence to conclude that the Defendant committed charged offense. The danger that such a similarity presents is equally present where a party seeks to use an expunged conviction, whose admission is governed by Rule 608(b). Therefore, in our view a trial court also should consider the *Waller* factors when determining whether to admit prior expunged convictions under Rule 608(b).

The proceedings below comport with Rule 608(b). On December 19, 2006, more than a month before the Defendant's January 27, 2007, jury trial, the State furnished written notice of its intent to impeach the Defendant with his prior commission of theft. Therefore, the State satisfied the first condition by giving reasonable notice to the Defendant. The trial court satisfied the second condition when it held a hearing after the selection but outside the presence of the jury and determined that the expunged conviction's prejudicial effect did not outweigh its probative value as to the Defendant's credibility. The trial court applied the two prongs of *Waller*, finding that the previous theft demonstrated the Defendant's untruthfulness and that the similarity of the conviction to the charge did not outweigh the expunged conviction's probative value:

With regard to the issue of does it have probative value, . . . obviously one of the key issues in this case is whether or not the check perhaps was a postdated check . . . . In other words did the Defendant represent to the victim . . . that there wasn't going to be sufficient funds in the account and therefore he needed to hold it. That means that credibility is going to be very, very important . . . . This incident at Wal-Mart happened on or about August 14th, 2004. It's alleged that . . . the incident that we're dealing with today as a trial happened February 3, 2005, some five to six months later. So, you know, I think it's in close proximity to the time that it occurred and I find that very, very important. . . . Number two, switching price tags, or UPC codes on items at a store and then pay for them using a different UPC code is, I think that's very much an indicator of credibility or truthfulness if he elects to testify. . . . Now the last part is, . . . there's a theft charge in this case and what amounts to be a theft in that case. . . . In this case it's basically an incident where it's alleged that he wrote a bad check . . . to obtain two guitars and a gun. And in that case, you know, it doesn't involve a bad check. . . . [T]he acts are not anywhere close to each other . . . . So, you know, again I think it's highly probative and, again, because credulity is so important to this case and the theft, or the swapping of UPC codes . . . goes to . .

. that issue, I feel that it's appropriate for the jury to hear it . . . .

Therefore, it is clear from the record that the trial court balanced the *Waller* factors and determined that the prejudice resulting from any similarity of the two offenses did not outweigh the probative value of the expunged theft conviction as to the Defendant's credibility. The trial court did not commit plain error when it allowed the State to cross-examine the Defendant about his prior expunged conviction for theft.

## **B. Admission of Evidence of Prior Bad Checks Written by the Defendant**

The Defendant contends the trial court erred in allowing the State's witness to testify that the Defendant had written several bad checks immediately prior to the conduct at issue. The State answers that the Defendant waived review of the testimony by not raising it as an issue in its motion for a new trial and that allowing the testimony was not plain error. We agree with the State.

The Defendant again fails to carry his burden of showing plain error, because the trial court breached no clear, unequivocal rule of law when it admitted evidence that the Defendant had previously written bad checks. The Defendant contends that the trial court erred in allowing the State's witness to testify that the Defendant had written several bad checks in the days leading up to the conduct giving rise to conviction at issue. Rule 404 of the Tennessee Rules of Evidence governs the introduction of a person's wrongs and bad acts. Crimes, wrongs, and bad acts generally may not be introduced to prove the character of a person in order to show action in conformity with an act presently at issue. Tenn. R. Evid. 404(a). However, a party may introduce such evidence to prove a fact other than the person's action in conformity with the disputed act. Tenn. R. Evid. 404(b). A trial court must do the following in order to admit evidence of bad acts for a purpose other than to prove character: (1) upon request, hold a hearing outside the jury's presence; (2) determine that a material issue exists other than conduct conforming with a character trait and, upon request, state on the record the material issue, the ruling, and the reasons for admitting the evidence; (3) find proof of the other crime, wrong, or act to be clear and convincing; and (4) exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b).

In the case under submission, the trial court held a hearing outside the presence of the jury to determine whether it should allow evidence of the Defendant previously overdrawing his bank account. This hearing satisfied the first requirement of Rule 404(b). The trial court first acknowledged that the Defendant's knowledge of the account's negative balance and its closure was a material issue, saying "as I understand the worthless check law . . . one of the elements that has to be there is that the defendant knew at the time that there was not sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check . . . ." The trial court did not explicitly state that it found the evidence of the prior bad checks to be "clear and convincing." However, that the trial court found the proffered bank records and letters to be sufficient proof of



prior bad checks is clear from the record.

Finally, the trial court explained that the probative value of the evidence, on the issue of whether the Defendant knew that his bank account contained insufficient funds to cover his \$900 check to Roark, was highly probative and not outweighed by the danger of unfair prejudice. The court allowed Lauzon to testify that the Defendant overdrew on his account at least four times and allowed the State to introduce bank documents reflecting the same. Furthermore, the trial court minimized any improper inferences by the jury when it read a pattern jury instruction cautioning jurors to consider bad acts only as proof of the limited issue of knowledge, not as proof of a defendant's disposition to commit the offense at issue.

Taking all of the trial court's acts into consideration, we conclude the trial court complied with Rule 404(b) when it allowed the State to introduce evidence that the Defendant had previously overdrawn on his account. Therefore, the trial court did not commit plain error when it allowed Lauzon to testify as to the Defendant's overdrafts and allowed documents reflecting the overdrafts to be entered into evidence.

### **C. Sufficiency of the Evidence**

Finally, the Defendant contends that the evidence introduced at trial is insufficient to support his conviction for theft over \$500.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*,

493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

*Bolin v. State*, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant contends that the evidence is insufficient to support his conviction for theft of property over \$500. In Tennessee, a person commits theft of property where “with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” T.C.A. § 39-14-103 (2006). If the value of such property is between \$500 and \$1000, then the theft is a Class E felony. T.C.A. § 39-14-105(2) (2006). In this case, the evidence must have shown, beyond a reasonable doubt: (a) that the Defendant exercised control over the guitars after they became Roark’s property; (b) that the Defendant did so without Roark’s effective consent; (c) that the Defendant acted with intent to deprive Roark of the guitars; (d) that the guitars less the value of the handgun were worth at least \$500.

Affording the State the strongest legitimate view of the evidence contained in the record and all reasonable inferences from that evidence, the Defendant induced Roark to give him possession of two guitars by leading Roark to believe that he could present the \$900 check for immediate payment. According to Roark, the Defendant obtained the guitars when he gave Roark the \$900 check and the handgun. As Roark testified, he would not have transferred the guitars to the Defendant had he known that the check would not be honored. Therefore, any “effective consent” to take possession of the guitars given by Roark to the Defendant was not effective.

Next, the evidence sufficiently supports the jury’s finding that the Defendant induced Roark to transfer the guitars to the Defendant with the intent to permanently deprive Roark of the guitars. The Defendant had previously owned the guitars. The Defendant did not return the guitars to Roark after Roark confronted him about the dishonored check. Given the Defendant’s desire to obtain the guitars that he had previously owned and his failure to return the guitars to Roark when the check

for \$900 was not honored, the jury could reasonably have found that the Defendant intended to permanently deprive Roark of the guitars.

Finally, the evidence supports the jury's finding that the stolen property had a value greater than \$500. According to Roark, the Defendant himself valued the Schector guitar at \$1700, although the Defendant testified that he bought the Schector for \$450. The Defendant reportedly told Roark that the Takamine and the Gibson together were worth \$3700, although the Defendant testified that he paid \$130 for the Takamine. Furthermore, the Defendant accepted \$800 from Roark in exchange for the Takamine and the Schector. Roark testified that the handgun was valued at \$250. Affording the State the strongest legitimate view of the evidence, the Schector and the Takamine together were worth at the very least \$800, the price the Defendant received from Roark in the original exchange. Therefore, the Defendant induced Roark to part with at least \$800 worth of property by offering Roark the worthless check and the handgun. Deducting the value of the handgun transferred as part of the re-purchase agreement, Roark was deprived of at least \$550 worth of property. Therefore, the jury could reasonably have found that the value of the property involved in this theft was between \$500 and \$1000. The Defendant is not entitled to relief on this issue.

### **III. Conclusion**

Based upon the foregoing reasoning and authorities, the judgments of the trial court are affirmed.

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ROBERT W. WEDEMEYER